

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FANAYE TURNER,

Plaintiff,

v.

UNIVERSITY OF WASHINGTON and,
BUDDY RATNER,

Defendants.

No. C05-1575RSL

ORDER DENYING DEFENDANTS'
MOTION IN LIMINE REGARDING
DISPARATE DISCIPLINE

This matter comes before the Court on “Defendants’ Motion In Limine Re Disparate Discipline” (Dkt. #24). In their motion, defendants “move the Court for an order in limine prohibiting plaintiff from arguing or attempting to introduce evidence of disparate discipline.” Id. at 1. Defendants identify eight events that they contend should be excluded as evidence of disparate discipline: (1) an April 2002 incident between plaintiff and Kahreen Tebeau; (2) a March 2003 incident between plaintiff and Nina Hanlon; (3) incidents involving Alma Weightman and Judy Peterson; (4) a complaints by Colleen Irwin against Jeff Bonadio; (5) a conflict between plaintiff and Michelle Barnett; (6) an incident between plaintiff and Ms. Weightman; (7) an incident between Verle Johnson and Victoria Clarkson; and (8) an incident involving Shari Ireton. Motion at 2-7; Reply at 3-6.

Defendants contend that these incidents have been identified by plaintiff as supporting

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1 her assertion of disparate discipline, but “[i]n order for disparate discipline evidence to be
2 admissible . . . it is necessary for the plaintiff to establish specific foundational elements: i.e.
3 that the nonprotected employee is similarly situated and that the same decision-makers were
4 involved.” Reply at 1. Defendants contend that the workplace conflicts identified do not
5 involve similarly situated persons. Reply at 3. For this proposition, defendants rely exclusively
6 on Fed. R. Evid. 104, contending simply that plaintiff “cannot meet the foundational
7 requirements for its consideration.” Motion at 2. In response, plaintiff contends that “whether a
8 comparator employee is similarly situated is ordinarily a question of fact for the trier of fact to
9 decide,” and therefore, this issue should be reserved for trial. Response at 16 (citing Johnson v.
10 Dep’t of Social and Health Servs., 80 Wn. App. 212, 230 (1996); Graham v. Long Island R.R.,
11 230 F.3d 34, 39 (2d Cir. 2000)).

12 In ruling on a motion in limine, the Court must decide the merits of introducing a piece of
13 evidence or allowing testimony without the benefit of the context of a trial. For this reason,
14 Fed. R. Evid. 103 empowers the court to make “a definitive ruling on the record admitting or
15 excluding evidence, either at or before trial.” Fed. R. Evid. 103(a) (emphasis added).
16 “Evidence should be excluded on a motion in limine only when the evidence is clearly
17 inadmissible on all potential grounds. A court considering a motion in limine may reserve
18 judgment until trial, so that the motion is placed in the appropriate factual context.” Wechsler v.
19 Hunt Health Sys., Ltd., 381 F. Supp. 2d 135, 140 (S.D.N.Y. 2003); see also 11 Charles Alan
20 Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2885 (“In nonjury
21 cases the district court can commit reversible error by excluding evidence but it is almost
22 impossible for it to do so by admitting evidence.”); Edward J. Imwinkelried, Evidentiary
23 Foundations § 1.03[2] (6th ed. 2005) (“As the Advisory Committee Note to Rule 104(a) states,
24 the technical evidentiary rules are generally viewed as ‘the child of the jury system,’ and
25 therefore there is no need to apply those rules when the judge is the factfinder.”). In light of this

1 authority, the Court turns to defendants' motion in limine.

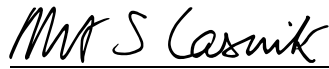
2 The cursory legal analysis offered by defendants provides the Court with minimal
3 justification to preclude this evidence at trial. The Court construes defendants' motion as
4 contending that the eight identified incidents are not relevant as evidence of disparate treatment
5 because plaintiff cannot show that the employees involved in these incidents are similarly
6 situated or that the decision makers are the same. As a result, the Court also construes
7 defendants' "foundational" motion under Fed. R. Evid. 104 as falling within the scope of Rule
8 104(b) "Relevancy conditioned on fact," which states: "When relevancy of evidence depends
9 upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the
10 introduction of evidence sufficient to support a finding of the fulfillment of the condition."

11 "When an item of evidence is conditionally relevant . . . it is customary to permit [the
12 offering party] to introduce the evidence and 'connect it up' later. Rule 104(b) continues this
13 practice, specifically authorizing the judge to admit the evidence 'subject to' proof of the
14 preliminary fact. It is, of course, not the responsibility of the judge sua sponte to insure that the
15 foundation evidence is offered; the objector must move to strike the evidence if at the close of
16 the trial the offeror has failed to satisfy the condition." Huddleston v. United States, 485 U.S.
17 681, 690 n.7 (1988) (quoting 21 C. Wright & K. Graham, Federal Practice and Procedure §
18 5054, pp. 269-270 (1977) (internal quotation marks omitted). The Court will follow this
19 procedure with respect to proffered evidence concerning disparate discipline because "[t]he
20 issue of similarly situated status is . . . fact specific and defies a mechanical or formulaic
21 approach." Bowden v. Potter, 308 F. Supp. 2d 1108, 1117 (N.D. Cal. 2004) (reviewing Ninth
22 Circuit law on "similarly situated").

23 For all of the foregoing reasons, the Court DENIES "Defendants' Motion In Limine Re
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1 Disparate Discipline” (Dkt. #24).¹

2 DATED this 10th day of October, 2007.

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5 Robert S. Lasnik
6 United States District Judge
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23 ¹ The Court also denies defendants’ “Motion to Strike” which they combined with their reply in
24 support of their motion in limine. See Dkt. #45 at 1. However, the Court finds that plaintiff failed to
25 comply with Local Civil Rule 7 by filing a twenty-page response without first requesting leave to do so
26 under Local Civil Rule 7(f). Because of this oversight by plaintiff, any future violations of Rule 7 in
this case by plaintiff may result in the imposition of sanctions by the Court.